EXCERPTS OF REPORTER'S TRANSCRIPT OF PROCEEDINGS [Pages 377 through 388]

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SANTA ANA, CALIFORNIA;
TUESDAY, NOVEMBER 7, 1995 10:00 A.M.

THE CLERK: Item number 1, SA CV 92-221-AHS (EEx), Patricia A. Billetter vs. Carl R. Luem, M.D., et al.; and Item number 2, SA CV 93-354-AHS (EEx), Patricia A. Billetter vs. Carl R. Luem, M.D., et al.

Counsel, please make your appearance.

MR. MAHAFFEY: Yes. Good morning.

Douglas Mahaffey representing the plaintiff Patricia Billetter.

MR. STRID: Good morning, your Honor.

Lawrence Strid on behalf of the defendant Carl Luem, M.D. I'm not technically substituted in yet. I did submit an ex parte application to that effect on both of the cases Friday.

THE COURT: Is the defendant present?

MR. STRID: No, he is not, your Honor. But I have him on standby ready to fly out. He resides in Georgia and he is in surgery this morning.

THE COURT: The matter is set for commencement of jury trial, today is the first day. The substitution has not been approved in light of the fact that the defendant appeared to be seeking a postponement of these proceedings and the delay to be occasioned would obviously retard commencement of proceedings here.

The plaintiff, as I understand it, had made a jury demand. However, according to the docket and the Court's file, the plaintiff has not perfected presentation of jury instructions. So it is not clear to me that that is how she intends to proceed.

Lastly, the clerk advises that the parties have been talking settlement, although it is apparent the matter has not been resolved.

I should like to know what plaintiff wishes in that regard.

MR. MAHAFFEY: Thank you, your Honor.

In regards to the Court's comments on plaintiff's demand for jury, plaintiff still maintains that demand. The pretrial order had ordered that defendants prepare the first set of jury instructions, prepare those and send those to plaintiff. We were then to correct them, submit them back, and then follow the Local Rule as to any areas that were objected to.

I wrote Dr. Luem approximately eight weeks ago and advised him that we had that obligation when he was in pro per and did not have a telephone. I have had in my possession since 1994, which I believe the Court may even have in the file, the plaintiff's jury instructions which I had served on his predecessor counsel. I waited him to respond and then spoke directly to Mr. Pierson about whether we needed to do something last week, and I, apparently not focusing carefully on the jury instructions, overlooked the fact that perhaps I should unilaterally submit my set.

I would represent that they are the same set that I gave to defense counsel about a year ago.

THE COURT: We show nothing ever filed with the Court. You are indicating that this was merely given to defense counsel at the time.

MR. MAHAFFEY: That's correct.

I don't see a file stamp on my set either, which I'm not sure I quite understand because it is blue-backed and it was with my other documents. It's a mystery why I didn't file it. But that was my oversight. And because there is a demand for jury, I believe that this may be something we

could remedy by filing this morning perhaps. That would be the request of the plaintiff.

Otherwise, we are prepared to proceed. There has not been an acceptance of the settlement offer that has been proposed at this time.

THE COURT: Let me indicate that the Court is actually entitled to not call in or otherwise discharge -- is entitled to discharge a jury panel that has been brought in where the parties have not perfected their jury instructions as ordered by the Local Rules in addition to the pretrial order in this particular case.

I am also concerned that the defendant is not here. And in light of the plaintiff's representation that she is prepared to go forward, I'm inclined to think that the matter should go forward without the assistance of proposed counsel, Mr. Strid, helpful though that would be, in light of the fact that I'm not disposed to postpone the matter. With regard to the jury, I'm willing to defer.

As a friend of the Court, Mr. Strid, is there any enlightenment that you can cast on this with regard to the status of defendant Luem?

MR. STRID: Well, your Honor, my client did admittedly wait to the eleventh hour to retain me. I was not technically retained until Friday, and I spent the entire weekend studying the file. Dr. Luem does want counsel in this matter. And if the Court would be willing to allow myself to be substituted in, I would have the authority to waive any request for a continuance of the trial on his behalf.

THE COURT: I am concerned about taking that representation from you only because we have received the ex parte application that was filed on November the 6th. I take it that there was no proof of service on the original, so it was returned, but we received it yesterday. And in light of the

request of the time needed, are you representing to the Court that you have full authority to try the case, to settle it if if becomes appropriate, and withdraw the request for continuance?

MR. STRID: Yes, I am, your Honor.

THE COURT: Let me move back then to -- well, let me inquire of defendant if it is his anticipation that a jury decide this matter.

MR. STRID: The defendant is not requesting a jury trial, your Honor.

THE COURT: Without ruling on the substitution yet, let me find out from plaintiff if this representation through proposed counsel is sufficient for plaintiff's purposes, given the history of the case.

MR. MAHAFFEY: Well, with due respect to my colleague at the bar, I understand his predicament. However, we have not received cooperation from defendant Luem. He is not present. This matter has been trailing, I believe, for a year based on a prior trial setting. The case was a '89 surgery, with the events being transpired in late '89, and the case was filed in superior court in 1991, I believe.

It's difficult for me to have a lot of sympathy for Dr. Luem who has had six months of notice of this trial since he has been in pro per. And I believe that to accept the substitution, allow an attorney to proceed -- one of my witnesses is Dr. Luem, and that defeats the strategy that I had, which was to call him first. And I'm not able to do that, to place in front of the jury what I believe is the most crucial evidence at the beginning of my case. I would object respectfully.

In light of counsel's efforts, I respect those, but this is a very serious matter and we are prepared to proceed. And there is no defendant here, there is no substitution on file.

There was a request for continuance made to me personally, as well as a notice served on me that was being made. You know, I would object and stand on our rights to proceed with no defendant present, and the Court can decide whether a jury needs to be impaneled or not.

Perhaps with the facts as they are, we may just waive jury and proceed right now with the Court, which we could simply do, and end this trial.

THE COURT: I must note that earlier in October, we issued an order to show cause to the defendant because we apparently did not have a correct telephone number where this litigant could be reached. And that was due to be returned to the Court on October the 23rd, and we have never received a response from defendant with regard to how he can be contacted concerning this case.

I'm not inclined to allow counsel to substitute in and, as plaintiff's counsel has suggested, due sympathy should be accorded to Mr. Strid who has attempted to come in at the eleventh hour to represent defendant in this case. I, too, am rather surprised, in fact quite surprised, that Dr. Luem is not present to defend himself in this case. And that was without consideration to any strategical decisions that the plaintiff may have had in mind with regard to calling him first.

If the Court is not persuaded otherwise, then I will deny the application to allow counsel to substitute in and have that matter go forward without the defendant. And the reason for that is simply that the case has been set for approximately one year and the defendant has been on notice of that. I do not wish to put Mr. Strid in a difficult position, but I think it is the situation that defendant Luem himself has created.

I would like to think about this for just a moment in light of your information. And, Mr. Strid, I will accord you an opportunity to comment further, but these are certainly my

inclinations at this point.

MR. STRID: Well, I appreciate your Honor's comments and I'm also familiar with the old saying that justice delayed is justice denied. But I think that justice rushed without giving a litigant an opportunity to be represented is also justice denied.

It is my understanding in reviewing the file that this case, when set for trial originally, was continued not at the behest of Dr. Luem, but at the behest of plaintiff's counsel who had some calendar problem in another courtroom and wanted the matter continued. And while some of this delay and this case going on so long may be attributable to Dr. Luem, I don't believe it should be allowed to rest entirely at his feet.

I would also point out to the Court that he is an obstetrician/gynecologist, he is running a rural practice back in Georgia, he has had surgery set for some time, including a hysterectomy which he is performing this morning. He has expectant mothers that he has to take care of, and he just -- he has to make arrangements for other physicians to do this. And he couldn't get out of the surgery.

And the man has represented to me, and I believe that, for what it's worth, that he is prepared to fly down here and participate in this trial. But without being given counsel, I do believe that would be in effect a moot exercise, your Honor. It would be extremely prejudicial and unfair to the defendant.

THE COURT: I will give it some consideration. I do have a jury panel on hold for this case, and we will have to decide how to proceed promptly in that I may need to release that panel to another judge for use today.

I see a defendant who has been on notice for a year about the trial date. So, given the information that he has a practice to run elsewhere is understandable, but really it does

not excuse a failure to appear on the date of trial. I will take a very brief recess to consider this further.

My inclination is to simply have the matter go forward. I guess I should inquire of plaintiff if, notwithstanding the absence of the first intended witness, Dr. Luem, the plaintiff is otherwise prepared to go forward.

MR. MAHAFFEY: Yes, we are, your Honor.

THE COURT: We stand in recess.

(Recess.)

THE COURT: The record will show the presence of counsel as before.

On due consideration, it appears to the Court that the matter should proceed to trial before the Court and proceed forthwith, the Court denying the substitution of counsel and denying what was filed a request for postponement.

The defendant being in pro per has not appeared and, depending on the course of the plaintiff's case, may have an opportunity to defend in light of the following: I intend to start the case, and if the matter is concluded today, the Court will decide the matter based upon the plaintiff's evidence. If it is not completed, the case will resume not tomorrow, but the following Tuesday, which would be November the 14th, at 8 o'clock in the morning. If the defendant elects to appear, he can then resume in the case or he may affirm to the Court all representations by counsel.

As noted, if we conclude the case today, the Court will decide the issues as framed in the pretrial order in both of these matters. If counsel have any additional suggestions with regard to how the matter should proceed, I will hear from plaintiff's counsel.

MR. MAHAFFEY: Nothing further, your Honor.

THE COURT: Is that agreeable with you, sir?

MR. MAHAFFEY: Yes, it is.

THE COURT: All right.

And by way of preserving defendant's objection through intended counsel, let us deem previous remarks of Mr. Strid offered to the Court at this time so that the defendant's position in the record is clear.

Is there anything further that you wish to note on his behalf, notwithstanding your nonappearance, Mr. Strid?

MR. STRID: If I may, your Honor.

Again, your Honor, with all due respect to the Court's ruling, and I hate to sound like a broken record on this, I think a tremendous injustice is being done Dr. Luem in this matter. I have offered to withdraw the request for a continuance if I can substitute in. I believe that there is very strong evidence which militates against the type of case that the plaintiff is bringing against the defendant.

And the plaintiff -- I don't expect to proffer that up, that evidence up, if she is allowed to proceed basically in a default mode, which means in all likelihood she is going to get a judgment, it's not going to be dischargeable and it's probably going to be for a large amount that my client is going to be visited with. And all he wants is an opportunity to present his side of the case through an attorney, and I don't think that that would stop this matter from going forward right now.

And that's all I wanted to say on the record. Thank you.

THE COURT: The defendant has in essence defaulted, as counsel notes, by not appearing on the date set for trial that was known approximately one year ago. And the concerns that we have had with regard to his responding to the Court's contacts that have been previously noted, the matter will proceed as noted.

Counsel for defendant who has offered to appear is not allowed to appear. The Court, of course, will permit counsel to remain in the courtroom, albeit not at defense counsel's seat, and the plaintiff can tell us the intended progress of her case.

I previously had looked at the witness list here, and inasmuch as defendant is not present, it does not appear, unless the plaintiff selects to wait until next Tuesday, which time can be set aside for conclusion or her case, to call the defendant, assuming he ever decides to come to Court. Otherwise, that witnesses, but let me double-check. Seventeen witnesses.

One last administrative item. I am going to direct the clerk to notify the clerk's office that the jury panel for this matter may be made available to other judges of the court that may need their services.

MR. STRID: In light of that ruling, your Honor, may I be excused?

THE COURT: You may be excused, if you so choose, of course. We will make note of any time that you appear or leave the courtroom, Mr. Strid.

And I will call upon plaintiff's counsel to issue opening statement at this time.

MR. MAHAFFEY: Thank you, your Honor.

The case in front of the Court, if the Court recalls, actually arose from both a civil action that was originally a malpractice batter action that became allegedly a nondischargeable claim by defendants' filing of

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